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No. 08-1100

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ANTOINETTE PIRANT,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. The Decision Below Deepens a Circuit Split Over Whether the Degree of Effort Involved in Donning and Doffing Protective Gear Is Relevant to Computing Hours Worked Under FLSA and FMLA.

A. The Decision Below Clearly Implicates the Split.

The Postal Service acknowledges that there is a circuit split on the question whether an employee should be credited with time spent donning and doffing work-related gear under the time-keeping provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 254, as incorporated in the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2611(2)(C). *See* Opp. 11-12. But the Postal Service contends that the decision below does not implicate this split and instead reflects the application of a settled standard to the specific facts of this case. That is plainly incorrect. The sole basis for the decision below was that Petitioner Pirant "was not required to wear *extensive and unique* protective equipment." Pet. App. 13a (emphasis added). That rule of decision places the Seventh Circuit in clear opposition to the Third and Ninth Circuits and on the side of the Second and Tenth Circuits in the split. The Postal Service's argument mischaracterizes the basis for the decision below and the rules other circuits have applied.

The standard in the Third Circuit in *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008), and the

Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005), prohibits consideration of the type of gear and the effort involved in donning and doffing it – the very consideration that was outcome-determinative here. Instead, those circuits focus on whether the gear is required by the employer for its benefit. The standard in the Second Circuit in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir 2007), *cert. denied*, 128 S. Ct. 2902 (2008), and the Tenth Circuit in *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) – and now Seventh Circuit in the decision below – focuses on the type of gear and the effort involved in donning and doffing it to determine whether the time should be counted. Moreover, the Department of Labor has made it clear that it stands with the Third and Ninth Circuits on the issue. Pet. App. 39a. Indeed, after the Seventh Circuit issued its opinion below relying on the Second Circuit's *Gorman* decision, the Secretary of Labor requested rehearing, arguing that *Gorman* wrongly focused on whether the gear was "unique or non-unique, and how extensive it was." *Id.*

The Seventh Circuit's revised opinion deleted the citation to *Gorman* but did not change any of the stated reasoning in the initial decision, retaining the rationale that Ms. Pirant's donning and doffing time does not count because she "was not required to wear *extensive and unique* protective equipment." Opp. 9 (emphasis added). Remarkably, the Postal Service claims that the revised opinion below "does not establish that the '*kind* of protective gear and *effort* involved in wearing it' necessarily dictate whether

donning and doffing time is compensable under the FLSA." *Id.* (emphasis in original). That assertion ignores the Seventh Circuit's reasoning, which is still based on the *Gorman* rationale.

The Postal Service also ignores the Seventh Circuit's reliance on the Tenth Circuit's decision in *Reich*. Like *Gorman*, *Reich* turned on the degree of exertion required to don and doff the gear, although it focused on whether donning and doffing was "work." The continuing validity of *Reich* is doubtful in light of this Court's holding that "'exertion' [is] not in fact necessary for an activity to constitute 'work' under the FLSA." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). The Postal Service explicitly recognizes the kinship between *Reich* and *Gorman* and concedes those decisions represent "different approaches" to the issue of counting employee time. Opp. 11. Thus, the Seventh Circuit's citation to *Reich* shows the side of the split on which it stands.

Contrary to the Postal Service's characterization of the decision below, it *does* turn on "the type of clothing here, standing alone." Opp. 9. The decision emphasized that the required gear was not "extensive and unique" and therefore concluded that "[t]he donning and doffing of this type of work clothing is not 'integral and indispensable' to an employee's principal activities and therefore is not compensable." Pet. App. 13a.

That implicates the core issue in the circuit split: whether the "type of clothing" governs the outcome. The Ninth Circuit strongly said "no" in

Alvarez, holding that "ease of donning and ubiquity of use do not make the donning of such equipment any less 'integral and indispensable'" to the job. 339 F.3d at 903. Likewise, in *De Asencio*, the Third Circuit reversed its district court, holding that a jury was impermissibly directed to consider whether donning and doffing the gear involved "some sufficiently laborious degree of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer." *De Asencio*, 500 F.3d at 373 (quotation marks omitted). In both the Third and Ninth Circuits, the test focuses on the employer's requirements, not on the "type of work clothing." Pet. App. 13a.

The different test here was outcome-determinative. *Gorman*, *Reich*, and now the Seventh Circuit's decision below all require the courts to evaluate whether clothing or gear is unusual or burdensome. On the other hand, *De Asencio* and *Alvarez* avoid *post-facto* second-guessing and focus on the objective factor of whether the employer considered the clothing or gear important enough to require its use.

B. Neither the Decision Below Nor the Other Cited Appellate Decisions Turned on Whether Donning and Doffing Was Required to Occur on the Employer's Premises.

In an attempt to draw attention away from the Seventh Circuit's clear adherence to the side of the

circuit split disavowed by the Department of Labor, the Postal Service argues that the Seventh Circuit based its rejection of Ms. Pirant's claim on a failure to show that her employer required her to don and doff the gear on the employer's premises. Opp. 10, 12. But that rationale played no role in the Seventh Circuit's decision, which expressly turned on a finding that the clothing was not extensive or unique and made no mention of whether the donning and doffing was required to occur on the employer's premises. Indeed, the only finding the Seventh Circuit made that remotely relates to that issue favors Ms. Pirant: the Seventh Circuit held that Ms. Pirant was "required" to wear the gear by her employer. Pet. App. 13a.

Nor did the decisions on the other side of the split – *Alvarez* and *De Asencio* – turn on whether donning and doffing was required to take place on the employer's premises. While such an employer requirement did in fact exist in both cases, nothing in the courts' reasoning made that factor significant to the outcome. In *Alvarez*, the court employed a test based on whether the gear (1) was necessary to the employee's principal work and (2) benefited the employer. 339 F.3d at 902 03.[1] The court in *De Asencio* endorsed the decision in *Ballaris v. Wacker*

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[1] The Ninth Circuit in *Alvarez* also examined whether this preparatory time was *de minimis* in order to conclude whether it should be counted. 339 F.3d at 903-04. But the Seventh Circuit did not address the *de minimis* issue, and the Postal Service's opposition does not raise it here, so it is irrelevant to this proceeding.

Siltronic Corp., 370 F.3d 901, 910-11 (9th Cir. 2004), particularly to the extent it looks to whether "this activity was performed at both broad and basic levels for the benefit of the company," which "led to the conclusion that the activity was not precluded by the Portal-to-Portal Act as merely preliminary." 500 F.3d at 372. Nothing in those opinions states that the outcome turned on whether changing on the premises was required.

The Postal Service places undue emphasis on a footnote in a DOL regulatory guideline that the Seventh Circuit did not even mention. The footnote states the DOL's view that donning and doffing "may" be integral and indispensable to the job "where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. § 790.8(c) n.65. Those suggested factors are reduced by the Postal Service – with reference to the *De Asencio* and *Alvarez* opinions – to a rule that donning and doffing time can only be counted when "the employer not only required that certain clothing or gear be worn, but also that the employees change into the gear on *the employer's premises*." Opp. 12 (emphasis in original). To the extent the Postal Service implies that time cannot be counted unless the employer requires changing to take place on the premises, that is incorrect. The guideline clearly states that time can be counted when the employer does not require the employee to change on the premises, if the "nature of the work" necessitates it.

More importantly, as noted above, the Seventh Circuit did not even discuss any additional "employer's premises" requirement. To be sure, it did note that the Postal Service required Ms. Pirant to wear specific gear suited to her work. Pet. App. 13a. But the Seventh Circuit did not decide whether those facts were at all relevant. Indeed, it ignored them. Its decision turned solely on whether the gear was unique and extensive – the very factors that the Third and Ninth Circuits have said are irrelevant. Thus, the Postal Service's argument can play no role here.

C. This Court Should Grant Review to Resolve the Split by Rejecting the Erroneous Test Applied Below.

The test employed by the Third and Ninth Circuits is preferable to the standardless test employed by the Second, Seventh and Tenth Circuits. A focus on whether the gear is required by the employer is eminently sensible. As this Court found in *Alvarez*, 546 U.S. at 25, if an employer requires performance by an employee of any task – even if no exertion is required – he employer must necessarily value that task; therefore, its performance is ordinarily compensable work.

Courts on the other side of the split have struggled to determine whether time spent donning and doffing particular gear should be counted. *See, e.g., Gorman*, 488 F.3d at 594 (work gear "may be indispensable without being integral"). The criteria they have applied boil down to little more than "we

know it when we see it." That is particularly true of the Seventh Circuit's decision here, which trivialized the Postal Service's on-the-job judgment (as opposed to its *post facto* litigation position) that the gear was necessary.

A rule focusing on the employer's requirements would remove uncertainty about what time should be counted and take the courts out of the business of determining, purely subjectively, whether donning and doffing particular gear is burdensome. Further, promoting clarity in this area fulfills a major goal of the FLSA and the Portal-to-Portal Act. *See* 29 C.F.R. § 790.4 (citing legislative history of Portal-to-Portal Act).

II. The Seventh Circuit's Requirement of an Arbitral Award as a Precondition of Credit for Wrongful Suspension Time Is at Odds with the Sixth Circuit and Also Merits Review.

In holding that Ms. Pirant could not receive credit for the two hours she alleged she was wrongfully prevented from working, the Seventh Circuit imposed a proof requirement that has no basis in the FMLA or the case law. The Seventh Circuit purported to follow *Ricco v. Potter*, 377 F.3d 599, 605 (6th Cir. 2004), where the Sixth Circuit held that time for calculating FMLA eligibility can include hours the employee "likely would have worked" if the employer had not prevented her from working them through a wrongful termination or suspension. Nevertheless, the Seventh Circuit refused to consider any record evidence of Ms. Pirant's wrongful suspension because she "fail[ed] to

pursue a formal challenge to her suspension" under her union contract's grievance procedure. Pet. App. 11a. That holding departs from – and conflicts with – *Ricco* and the Sixth Circuit's subsequent decision in *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 547-49 (6th Cir. 2008).

In *Nance*, the court reiterated that *Ricco* held that for FMLA eligibility purposes, an employee should be credited with "hours that the employee wanted to work but was unlawfully prevented by the employer from" working. *Id.* at 557 (quoting *Ricco*, 377 F.3d at 605). The *Nance* plaintiff had pursued a claim under the American With Disabilities Act relating to an unlawful termination and had lost in arbitration before appealing to the district court. Although the *Nance* court ultimately ruled against the plaintiff on the ground that she had resigned and had not been fired, the court explicitly held that *de novo* review of the arbitrator's conclusion was warranted because the federal statutory right could not be circumscribed by the terms of a contract serving a different purpose. *Id.* at 547-49, 556. As the court explained, "because the specialized competence of the arbitrators pertains primarily to the law of the shop, not the law of the land . . . whether [the plaintiff] resigned without notice might mean one thing under [the company's collective bargaining agreement], but it may very well mean an entirely different thing for purposes of an 'adverse employment action' under the ADA." *Id.* at 548-49.

Thus, in the Sixth Circuit a favorable arbitral award is *not* a precondition for litigation of a federal

statutory claim based on the record compiled through ordinary civil procedures. To the contrary, the Sixth Circuit permitted *de novo* litigation of the issues even after an unfavorable arbitration decision. In sharp contrast, the Seventh Circuit refused even to consider the extensive record evidence here.[2] In characterizing Ms. Pirant's claim of a wrongful suspension as merely an "unsubstantiated subjective belief" that the suspension was wrongful, Pet. App. 11a, the Seventh Circuit plainly treated the absence of an arbitral back pay award as the *only* relevant data point and excluded consideration of any other evidence of wrongfulness in the litigation record. That conclusion is both wrong and in conflict with the Sixth Circuit's approach.

Indeed, the Seventh Circuit's decision is contrary to a significant body of law that distinguishes rights based on contract and rights based on statute. It is permissible to require exhaustion of contractual remedies before bringing a *contract-based* claim to federal court. However, a federal *statutory* right cannot depend on exhaustion of contractual remedies. Imposing such a requirement would significantly weaken the right or

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[2] The substantial record evidence included a written report of the incident where Ms. Pirant was suspended for two hours by her floor supervisor by being ordered to clock out and go home. (*See* Pirant's Memorandum in Opposition to Defendant's Motion for Summary Judgment, 03-9383 (N.D. Ill.) [D.E. 62] at 3-4; Pirant Decl., Ex. F, ¶ 22; Ex. L at 0607-09; Andrews Dep., Exhibit M, at 11:15-12:23; 23:3-5; 24:1-25:11.) The supervisor himself conceded he had no authority to order her to clock out. (Peden Dep., Ex. D, at 74:23-78:8.)

protection created by Congress. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 736-38 (1981); *Collins v. Lobdell*, 188 F.3d 1124, 1127 (9th Cir. 1999).

Here, Ms. Pirant did not request that a federal court award her back pay, a contractual remedy she was required to arbitrate. Thus, she did not make a "collateral challenge to an employment suspension," as the Postal Service contends. Opp. 14. Rather, she only sought to establish *as a factual matter* that, but for the two hours she would have worked had she not been sent home prematurely, she would have met the 1250-hour FMLA eligibility threshold. Had she not been covered by a collective-bargaining agreement, the court would necessarily have been required to decide whether the two hours should have counted. Ms. Pirant's eligibility for FMLA benefits cannot hinge on her failure to pursue a contractual remedy established for an entirely different purpose.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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